

A **E & E Equipment Sdn Bhd v**
Speci Avenue (M) Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO D1(S2)–
25–33–2000

B VINCENT NG J
4 MAY 2005

C *Civil Procedure — Contempt of court — Contempt proceedings — Breach of mandatory injunction — Application for committal of defendant for failing to comply with mandatory injunction — Whether upon a criminal standard of proof, the defendants had refused rather than unable to comply with the mandatory injunction because the cranes were sold before the mandatory injunction was obtained and served on the defendants — Rules of the High Court 1980 O 52*

D This was the plaintiff's application made pursuant to O 52 of the Rules of the High Court 1980 to commit the defendants to prison for failing to comply with the mandatory injunction of the court for the return of four cranes to the plaintiff. In essence the plaintiff's case was that the defendants had disobeyed the injunction order dated 15 March 2000. The plaintiff had alleged that the four cranes legally belonged to the plaintiff and were lawfully repossessed. The defendants contended that they could not comply with the mandatory injunction because the four cranes were sold to third parties. The issue in this case was whether, upon a criminal standard of proof, the defendants had refused rather than unable to comply with the mandatory injunction because the four cranes were sold before the mandatory injunction was obtained and served on the defendants.

F **Held**, dismissing plaintiff's application:

- G** (1) The plaintiff had failed to adduce any evidence at all to prove that the four cranes were at the material time in the possession, custody or control of the defendants when the mandatory injunction was served on the defendants (see para 7).
- (2) Since the standard in contempt proceeding is beyond reasonable doubt, clearly the plaintiff's case fell short of this standard, as any argument based merely on implication of certain facts would find no place in contempt proceedings. (see para 7).
- H** (3) There was insufficient evidence to support the plaintiff's contention that the defendants were able to comply with the order as the cranes had not been sold to third parties (see para 8).

I **[Bahasa Malaysia summary]**

Ini adalah permohonan plaintif yang dibuat menurut A 52 Kaedah-Kaedah Mahkamah Tinggi 1980 untuk memenjarakan defendan kerana gagal untuk

mematuhi injunksi mandatori mahkamah bagi memulangkan empat kren kepada plaintif. Secara dasarnya, kes plaintif adalah defendan telah tidak mematuhi perintah injunksi bertarikh 15 Mac 2000. Plaintif telah menyatakan bahawa empat kren tersebut secara sah dimiliki oleh plaintif dan diambil semula dengan sah. Defendan-defendan menghujahkan bahawa mereka tidak boleh mematuhi injunksi mandatori tersebut kerana keempat-empat kren tersebut telah dijual kepada pihak ketiga. Isu dalam kes ini adalah sama ada, dalam tahap pembuktian jenayah, defendan telah enggan dan bukannya tidak dapat mematuhi injunksi mandatori kerana keempat-empat kren tersebut telah dijual kepada pihak ketiga sebelum injunksi mandatori tersebut diperolehi dan diserahkan kepada defendan.

Diputuskan, menolak permohonan plaintif:

- (1) Plaintif telah gagal untuk mengemukakan sebarang bukti untuk membuktikan bahawa empat kren tersebut pada masa yang material adalah berada dalam milikan, jagaan dan kawalan pihak defendan semasa injunksi mandatori diserahkan kepada defendan-defendan (lihat perenggan 7).
- (2) Memandangkan tahap pembuktian dalam kes penghinaan mahkamah adalah di luar keraguan yang munasabah, kes plaintif dengan jelasnya tidak mencapai tahap ini, kerana sebarang hujah yang hanya berdasarkan kepada implikasi fakta-fakta tertentu tidak diambilkira dalam tindakan menghina mahkamah (lihat perenggan 7).
- (3) Tidak terdapat bukti yang cukup untuk menyokong hujah plaintif bahawa defendan berupaya untuk mematuhi perintah kerana kren tidak dijual kepada pihak ketiga (lihat perenggan 8).]

Notes

For a case on contempt proceedings, see 2(1) *Mallal's Digest* (4th Ed, 2004 Reissue) para 1600.

Legislation referred to

Rules of the High Court 1980 O 52

Tan Hock Chuan (Tan Hock Chuan & Co) (Cains Tan with him) for the plaintiff.
Selvi Sandrasegaram (Gooi & Azura) for the defendants.

Vincent Ng J:

PREAMBLE

[1] Enclosure 12 is the plaintiff's application made pursuant to O 52 Rules of the High Court 1980 to commit the second, third and fourth defendants

- A** to prison for failing to comply with the mandatory injunction of the court dated 15 March 2000 for the return of four cranes to the plaintiff. The second and third defendants are directors of the first defendant, whilst the fourth defendant is the company secretary of the first defendant. In essence the plaintiff's case is that the defendants had disobeyed the injunction order dated 15 March 2000.
- B**

BACKGROUND FACTS

- C** [2] The plaintiff had alleged that the four units of Crawler cranes legally belonged to the plaintiff and were lawfully repossessed on the defendants' invitation vide letter dated 6 August 1999. The defendants did not deny being served with the injunction order. Nor did they deny that they did not comply with the terms of the injunction order. The defendants contended that they could not comply with the court order dated 15 March 2000 because the four cranes were sold by the first defendant on 30 November 1999 to Nation Joy Sdn Bhd for RM120,000 and the sale was completed on 30 November 1999.
- D** And, they exhibited Exhibits CCT-18, CCT-19 and CCT-10 of Encl 13 being a letter of confirmation of sale, evidence of delivery and the transfer of ownership.

E ISSUE

- [3] Whether, upon a criminal standard of proof, the defendants had refused rather than unable to comply with the order of 15 March 2000 because the cranes were sold before the mandatory injunction was obtained and served on the defendants.

- F** [4] The plaintiff case was that the assertions of the defendants cannot be believed because it is in conflict with Mr Kam's (first defendant's previous counsel) statement in court, during the application for the injunction order on 15 March 2000 before his Lordship Justice Mohd Ghazali bin Mohd Yusoff, that the cranes were still in the possession of D1. Besides, even after the injunction was served on the defendants the court was not informed that the cranes were sold in 1999. It was only on 15 September 2000, when the defendant filed an application in D1-22-2368 of 1999 to vary the injunction order, that the court was, for the first time, made aware of this fact.
- G**

- H** [5] On this aspect of the plaintiff's case the defendants' former counsel Mr SM Kam submitted himself for cross-examination. When SM Kam was cross-examined on 12 February 2004, he informed the court that on 15 March 2000, when he said the cranes were in the possession of the first defendant, it was not based on any instructions from the first defendant but upon his own assumption, as he had known that the first defendant had repossessed the said cranes in November 1999. He testified that what he said was based upon a mistaken belief. I find this evidence unshaken in cross-examination.
- I**

[6] The defendants had contended that the steps taken by the first defendant to deposit the proceeds of sale of the four cranes with their new solicitors as stakeholders had demonstrated an absence of contemptuous intent on their part. And, that the defendants could not possibly have taken any further steps to vary the order earlier as it was academic considering that the said cranes had already by then been sold by them.

[7] The plaintiff had argued that it is highly unlikely that D1's counsel attended court without any instructions. A reasonable person would have instructed his solicitors regarding the status of the cranes. And, that it is unlikely that first defendant's counsel, who must have spoken to second defendant when he informed court that the four cranes were in the first defendant's possession, were merely on an assumption. Notably, the plaintiff had failed to adduce any evidence at all to prove that the four cranes were at the material time in the possession, custody or control of the defendants. It is my considered view that since the standard in contempt proceeding is beyond reasonable doubt, clearly the Plaintiff's case falls short of this standard, as any argument based merely on implication of certain facts finds no place in contempt proceedings.

[8] It is trite and settled that the standard of proof in contempt proceeding is the criminal standard, that is, proof beyond reasonable doubt. In the light of the evidence of Mr SM Kam I agreed with the defendants' submission that there was insufficient evidence to find the defendants guilty of disobedience of the mandatory injunction order. I thus held that the plaintiff had failed to discharge their heavy burden of proving beyond reasonable doubt that the cranes were in the possession, custody or control of the first defendant when the injunction order was served on the defendants. I was satisfied that there was insufficient evidence to support the plaintiff's contention that the defendants were able to comply with the order as the cranes had not been sold to third parties.

[9] The plaintiff had further argued that since the defendants did not file any affidavit in reply to the plaintiff's application for the mandatory injunction it leads to the irresistible conclusion that the cranes were indeed in D1's possession. But in my view, it would not accord with reason and law to hold that a counsel's non-action could bind the defendants on a criminal charge for contempt. It follows that counsel's non-response to the plaintiff's affidavit in support of the mandatory injunction, is insufficient to establish any contempt on the defendants' part.

[10] In the event, the plaintiff's application in encl 12 was dismissed with costs.

Plaintiff's application dismissed with costs.

Reported by Peter Ling

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